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No. 07-1

IN THE

Supreme Court of the United States

ROBERT EARL PIERCE,

Petitioner,

v.

DEPARTMENT OF THE AIR FORCE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition involves the scope of the Privacy Act. That statute prohibits federal agencies from releasing protected "records" unless: (1) one of the 12 statutory exemptions applies or (2) the person identified in the document has given consent. 5 U.S.C. § 552a(b). The statute defines a record as a document that (1) is about a person and (2) contains a person's name "or the identifying number symbol or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. § 552a(a)(4) (emphasis added).

The issue presented is whether the term "identifying particular assigned to the individual" includes any information that, as a practical matter, can be used to identify a person or whether it is limited to identifying information that is *unique* to only a single individual.

Restated, should the term "identifying particular assigned to the individual" in the Privacy Act be construed *in pari materia* with the term "personal identifying information" as that term has been used in construing Exemption 6 to the Freedom of Information Act. 5 U.S.C. § 552(b)(6).

In this case, the Petitioner was identified in a document by his duty title, the name of his military unit and the location of his unit. While he was not identified by name, the disclosed information was sufficient for local newspapers to determine his name.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
A. Facts.	2
B. Course of Proceedings and Holdings Below.	5
REASONS FOR GRANTING THE PETITION	8
A. Introduction.	8
B. Contrary to Congressional Intent.	9
1. The Act.	10
2. The Legislative History.	11

Contents

	Page
3. The Implementing Regulations.	13
a. The 1975 Guidance.	13
b. 1987 OMB Guidance.	15
C. The Relationship with the Freedom of Information Act.	18
D. Conflict in the Circuits.	27
E. Impact on the Regulatory Framework. ..	29
CONCLUSION	30

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed December 21, 2007 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The Southern District Of Mississippi, Jackson Division Decided September 30, 2006 ..... 19a

Appendix C — Excerpted Regulations Of The Office Of Management And Budget 32a

Appendix D — Excerpted Regulations Of The Office Of Management And Budget 35a

TABLE OF CITED AUTHORITIES

Page

Cases:

Boyd v. Sec'y of the Navy, 709 F.2d 684 (11th Cir. 1983), *cert. denied, Boyd v. Lehman*, 464 U.S. 1043, 104 S. Ct. 709, 79 L. Ed. 2d 173 (1984) ... 28

Dep't. of the Air Force v. Rose, 425 U.S. 352 (1976) ..... *passim*

NLRB v. Tobey, 40 F.3d 469 (D.C. Cir. 1994) ... 9, 24, 28

Quinn v. Stone, 978 F.2d 126 (3d Cir. 1992) 27

Unt v. Aerospace Corp., 765 F.2d 1440 (9th Cir. 1985) 28

U. S. Department of State v. Ray, 502 U.S. 164 (1991) 9, 28

Statutes:

5 U.S.C. § 552 ..... 18, 20

5 U.S.C. § 552a *et seq.* ..... *passim*

28 U.S.C. § 1254(1) 1

Pub. L. 93-502 § 4 20

Pub. L. 93-579 ..... 11, 20

Pub. L. 93-579 § 2(b)(4) 10

Cited Authorities

Page

Regulations:

OMB Circular 7-9-75 13

32 CFR Pt. 505, App. H 14

32 CFR § 806(b).45 14

40 Fed. Reg. 28948, 28951-52 14

52 Fed. Reg. 12990-12991 (4/20/87) 16, 17

AFI 51-201 ¶ 7.15, Administration of Military Justice. 30

AFI 90-301 ¶ 1.41.7.1 29

AFI 90-301 ¶ 1.41.7.2 29

OPINIONS BELOW

The opinion of the court of appeals is reported at 512 F.3d 184, 2007 WL 4465367, 2007 U.S. App. Lexis 29749 (5th Cir. 2007). *See* Appendices A-B. The judgment and opinion of the court of appeals was entered on December 21, 2007. The opinion of the district court is reported at 527 F. Supp. 2d 522, 2006 U.S. Dist. Lexis 74449 (S.D. Miss. 2006).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The definition of a protected "record" under the Privacy Act is:

> the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

5 U.S.C. § 552a(a)(4).

STATEMENT OF THE CASE

A. Facts.

This case began in 1998 when Jody Bryant started a personal campaign to become the commander of a unit of the Mississippi Air National Guard, the 186th Air Refueling Wing (ARW) in Meridian, Mississippi. After a two year effort, Bryant's campaign came to an end when he was rebuked by two generals for his campaign tactics. In February 2001, a disgruntled Bryant then filed allegations with the Inspector General of the Air Force (IG) against several general officers.

The Air Force IG appointed a member of its staff, Colonel David Bertholf, to be the Investigating Officer. Colonel Bertholf issued his report in July 2002, finding that allegations against three officers (not the petitioner) were substantiated. The IG also released a summary of the Bertholf report to Bryant on 1/22/03. That report identified the subjects by their duty titles, unit and location. Bryant leaked a copy of that summary report to several newspapers, which printed the details of the report and identified the subjects by name. The release of that report is not challenged. It did not name the petitioner.

A follow-up investigation was ordered to deal with more of Bryant's allegations. In February 2003, Colonel Ken Emanuel was appointed to be the investigating officer (IO). The petitioner became one of fifteen subjects in the second investigation. On May 31, 2004, Colonel Emmanuel completed his Report of Investigation ("ROI") finding that allegations against 13 officers

(including the petitioner) were substantiated by some evidence. Because the ROI named the subjects by name, it was therefore protected by the Privacy Act. The Air Force was able to release a copy to the Mississippi Adjutant General in September 2004 under the intra-agency exemption to the Privacy Act. 5 U.S.C. § 552a(b)(1). That exemption permits the release of a protected document for the limited purpose of allowing a federal employee to perform his or her job. In this case, the Adjutant General had to decide if any discipline was warranted.

The Air Force IG then tasked Colonel Ronnie Rogers to send a final response to Bryant. Colonel Rogers, the active duty IG assigned to the Mississippi National Guard,[1] collaborated with his counterparts in the Air Forces IG headquarters to complete the 8-page response.

The response identified the 15 subjects by their respective duty titles and further identified them as members of the 186th Air Refueling Wing at Key Field, in Meridian, Mississippi. Under each of the 15 duty titles, the response contained a summary of the allegations that had been substantiated against each individual. The response contained a total of 44 allegations. The "substantiated" allegations were the opinion of a single person, the investigating officer. The IG system does not provide for any review before the investigating officer renders a report.

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1. The Air Force IG (not the Mississippi National Guard) was responsible for releasing the response to Bryant. When Colonel Rogers sent the response, he was following the directive of the Air Force IG Office.

The petitioner was identified as the "Manager of the C-26 Program" in seven allegations and as the Counter Drug Coordinator one allegation. The petitioner changed jobs in 2001. The response stated that seven of eight allegations against the petitioner had been substantiated.

On October 15, 2003, Colonel Rogers signed and sent the 8-page response to Bryant. The petitioner claims that the release violated the Privacy Act because the document identified him and 14 others by "identifying particulars assigned to" them, i.e., their duty title, place of employment and the name of the employer. As he had done before, Bryant leaked a copy of the response to a local newspaper. The local newspaper was able to identify the subjects by name. The story identified by name the petitioner and the other 12 subjects against whom allegations had been substantiated. The story detailed the allegations substantiated against each person.[2] The local newspaper (*The Meridian Star)* published the story on page one under the banner headline "*Scathing Report Confirms Corruption at Meridian Based Air Guard Unit.*" That story listed the seven allegations that were substantiated against the petitioner. Those allegations were that he had:

- Wrongfully disposed of a headset and a digital camera.
- Cheated on PME examinations.
- Had an unprofessional relationship with an enlisted person.

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2. The newspapers did not identify the two officers against whom no allegations were substantiated.

- Referred a subordinate pilot for a mental health evaluation.
- Made unauthorized flights.
- Manipulated the merit selection process.
- Failed to update his military medical records.

A state-wide newspaper (The Jackson *Clarion Ledger)* had a banner headline read "*Corruption in Guard Unit Cited.*" That story also identified the petitioner by name. The subjects were devastated and humiliated. This was a "worse case scenario" that the Privacy Act was intended to prevent a single person, the investigating officer. The IG system does not provide for any review before the single investigating officer renders a report.

B. Course of Proceedings and Holdings Below.

The plaintiff filed suit for a willful violation of the Privacy Act by releasing a document that included "identifying particulars" about the 15 individuals. The district court granted the Air Force's motion for summary judgment on grounds that the response was not a protected "record" as defined by the Privacy Act. App. B. The court of appeals affirmed on a slightly different rationale. App. A.[3]

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3. The Act covers "records" in a "system of records." While the Air Force denied that the response it was a "record," it did not deny that the response was kept in a "system of records" as defined in 5 U.S.C. § 552a(a)(5). All agencies are required to publish in the Federal Register the existence of their systems of records and the records contained therein. 5 U.S.C. § 552a(e). (Cont'd)

The court of appeals held that a duty title is not an "identifying particular." The court of appeals held that a "record" must contain identifying information that is *unique* to only a single individual. App. A at 7a.

The court added that a duty title is not *unique* to only a single person because the petitioner and most people change their duty titles over time. App. A at 7a. Therefore, the document that identified the petitioner and 12 others by their duty titles was not a protected "record," and the Air Force's release of it was not a violation of the Act.

In dicta, the court of appeals gave two examples of a duty title that could be *unique* to a single individual (and therefore a protected record): (1) when only one person ever held the job title or duty title, and (2) when the job title is also identified with a specific date. App. A at 7a, 10a. Neither example applied here.

The two examples of *unique* duty titles show a difference in approach to that taken by the district court. The district could did not give any examples of unique duty titles. Rather, it held that the need to link information inside the document with other information outside the document would render it unprotected by the Privacy Act. App. B at 30a – 31a.

(Cont'd)
The Air Force designated IG records as a "system of records." 69 Fed. Reg. 44515, 44517 (7/26/04). That notice specifically states that "responses to complainants" and reports of investigations are documents in the IG files. *Id.*

The two examples of *unique* duty titles cited by the court of appeals still required some linking or cross-referencing to information outside the document to match the duty title with a person's name. Hence, the "need to link" was not the determining factor for the court of appeals. Rather than linkage, the court of appeals focused on whether the identifying information was *unique*. App. A at 7a.

The court of appeals was not concerned that – as a practical matter – the release of the *non-unique* identifying information (duty titles, military unit and location of the unit) was sufficient to allow Bryant or any other reader to identify the subjects. "The Air Force . . . cannot be held accountable [if] Bryant [gave information to the newspapers]. . . . The fact that the newspapers made the connection . . . does not establish a Privacy Act violation." App. A at 18a.

REASONS FOR GRANTING THE PETITION

A. Introduction.

This case presents a substantial question of federal law that deserves review by this Court. The court of appeals has severely restricted the protection of the Privacy Act by limiting it to documents that *uniquely* identify an individual.

This was more than just a narrow reading of the language in the Act. The decision below forged the word *unique* into the statutory term "identifying particular." That restrictive reading is contrary to the plain wording of the statute, its legislative history and implementing regulations. The court of appeals said that the duty title was not unique to only him because other people either hold or have held the same duty title. Under that rationale, a document with private information about "the Chief Justice of the United States Supreme Court" would not be protected by the Privacy Act because it did not identify which chief justice.

This decision will impact many Americans. The government has millions of documents with personal and private information about individuals. Agencies can easily neutralize the protection of the Act by redacting a person's name or other uniquely identifying information. The document could then be released in spite of the fact it contains other *non-unique* personal identifying information (e.g., a telephone number, date of birth, address, etc). The danger to privacy is real.

While the other circuits have had some minor differences in defining the term "record." *NLRB v. Tobey*, 40 F.3d 469, 472 (D.C. Cir. 1994,) the decision below is a sea change from all the other circuits. For the first time in the 33 year history of the Act, the Privacy Act has been construed to protect only documents that *uniquely* identify a single individual.

This Court should accept this petition to decide whether the Privacy Act and FOIA Exemption 6 should be construed *in pari materia* on the narrow issue raised here. Both statutes prohibit in varying degrees the disclosure of government documents that identify individuals. FOIA protects "personal identifying information" and the Privacy Act protects an "identifying particular assigned to the individual." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976) and *Department of State v. Ray*, 502 U.S. 164 (1991). Given the common purpose and similar zones of protected privacy, the definitions at issue should be construed *in pari materia*. This Court has broadly construed FOIA Exemption 6 when personal privacy is at risk. The court of appeals' restriction on the Privacy Act is totally inconsistent with this Court's decisions in *Rose* and *Ray* on the scope of FOIA Exemption 6.

B. Contrary to Congressional Intent.

The Privacy Act of 1974 regulates the collection, maintenance, use, and dissemination of an individual's personal information by federal government agencies. *See* 5 U.S.C. § 552a *et seq.* One "purpose of this Act . . . is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal

agencies . . . to disseminate any record of ***identifiable personal information*** in a manner that assures . . . no misuse of such information." Pub. L. 93-579 § 2(b)(4) (emphasis added). The Act requires that "no agency shall disclose any record which is contained in a system of records . . . to any person . . . with[out] the prior written consent of the individual to whom the record pertains." *Id.* § 552a(b). The Act also has twelve exemptions to this "Do Not Disclose" requirement, none of which were plead by the Air Force.

In construing the term "record," the court of appeals held its was restricted to identifying information that is *unique* to only a single individual. App. A at 7a. The court of appeals did not cite any of the usual aids to statutory construction, i.e., the plain wording of the statute, its legislative history, and implementing regulations. Those aids show that the Act is not so restricted and that *non-unique* information can be an "identifying particular."

1. ***The Act.*** The Act defines a "record" as a document containing a person's name or other "identifying particular assigned to the individual." Congress' Findings and Statement of Purpose includes a broad statement of its purpose that gives no hint of a limitation. Pub. L. 93-579 § 2(b)(4). If Congress had intended to so restrict the Act, the addition of that single word *unique* would have expressed that intent. The word "unique" is not in the statute. Nothing in the plain wording of the statute supports a restrictive reading of the term "identifying particular" to protect only documents with unique identifiers.

2. *The Legislative History.* The legislative history is similarly void of any indication that Congress intended to restrict the Act to documents with *unique* identifiers.[4] The term "record" originated in the House bill.[5] The Senate bill used the term "personal information."[6]

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4. Legislative History of the Privacy Act of 1974, S. 3418, (Public Law 93-579), Joint Committee Report of the Committees on Governmental Operations of the U.S. Senate and House of Representatives, 94 Cong., 2nd Session, Sept. 1976 (*hereinafter Legislative History*).

5. H.R. 16373 as introduced on 8/12/74 defined the term "record" as follows:

> (4) The term "record" means any collection or grouping of data about an individual that is maintained by an agency and that contains his name, identifying number, symbol or other identifying particular assigned to each such individual.

Legislative History at p. 239, 242. As reported out of the House Committee, the definition of a record was slightly modified to substitute the word "information" for the word "data" in the first line and to substitute the word "the" for the words "each such" in the last line. Legislative History at p. 258, 278.

6. As introduced by Senator Sam Ervin, the Senate bill (S. 3418) defined personal information as follows:

> (3) the term "personal information" means all information that describes, locates, or indexes anything about an individual including his education, financial transactions, medical history, criminal or employment record, or that affords a basis for inferring personal characteristics such as finger and voice prints, photographs, or things done by or to such individual and the record of his presence, registration, or membership in an organization or activity, or admission to such an institution.

Legislative History at p. 9, 24-25.

The final definition of a "record" was a blend of those definitions. The language below in ***bold and italic type*** came from the Senate bill. The regular type came from the House bill. The key language for purposes of this case is underlined below.

> the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, ***including, but not limited to, his education, financial transactions, medical history, and criminal or employment history*** and that contains his name, or the identifying number, symbol, or *other identifying particular assigned to the individual, such as a finger or voice print or a photograph;*

5 U.S.C. § 552a(4).

While the blended definition may have lacked perfect symmetry, Congress obviously wanted to keep the widest breadth of both definitions. There is no hint in this legislative history that Congress intended to protect only documents with *unique* identifiers.

The references to immutable physical characteristics like a voice print or a fingerprint (admittedly unique) were examples and not limitations. Those examples do not suggest that Congress intended to restrict the Act's protection to documents with *unique* physical identifiers. If that had been Congress' intent, it would have been easy to say so. Congress' use of the term "assigned" particular shows a much broader purpose.

3. ***The Implementing Regulations.***

a. ***The 1975 Guidance.*** The implementing guidelines from the Office of Management and Budget (OMB Circular 7-9-75) provided the most direct and compelling evidence that Congress intended to protect documents with *non-unique* identifiers.[7] Those regulations specifically say that "***[i]dentifying particulars are not always unique***," and the Act protects individual identifiers in any form.

> A "record" [m]eans any item of information about an individual that includes an individual identifier; . . . [and i]ncludes ***individual identifiers in any form*** including, but not limited to, finger prints, voice prints and photographs.
>
> * * *
>
> The phrase "identifying particular" suggests any element of data (name, number) or other descriptor (finger print, voice print, photographs) which can be used to identify an individual. ***Identifying particulars are not always unique*** (i.e., many individuals share the same name) but when they are not unique (e.g., name) they are individually assigned—as distinguished from generic characteristics.

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7. Congress gave the Director of the Office of Management and Budget the duty to (1) "prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section." 5 U.S.C. § 552a(v).

> The term "record" was defined "to assure the intent that a record can include ***as little as one descriptive item*** about an individual.

App. C at 33a-34a (40 Fed. Reg. 28948, 28951-52)(emphasis added). The court of appeals did not cite this 1975 guidance but it did cite two obscure regulations – one from the Army and the other from the Air Force. App. A at 7a. The court of appeals cited the definition of "personal identifier" from the definitional sectional of the Army's Privacy Program, 32 C.F.R. Pt. 505, App. H. The only apparent reason was that it contained the word "unique." However, the court of appeals did not cite the nearby definition of "Protected Personal Information" which protects *unique* information and any *non-unique* information "that identifies, relates to, . . . or describes [a person] *Id.*[8]

The Air Force regulation [32 C.F.R. § 806(b).45] allows the public release of a member's current or past duty title. App. A at 7a. That regulation simply shows how the document released to Bryant could have been linked with other information to identify the petitioner and the other

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8. (s) Personal identifier. A name, number or symbol that is unique to the individual, usually the person's name or SSN.

* * *

(x) Protected Personal Information. Information about an individual that identifies, relates to, is unique to, or describes him or her (e.g. home address, date of birth, social security number, credit card or charge card account, etc.).

32 C.F.R. Pt. 505, App. H.

subjects. After the IG released the subjects' duty titles, a reader merely had to call the unit clerk for the names of the current and former holders of the duty titles. Neither regulation is authority for the scope of the Privacy Act.

b. ***1987 OMB Guidance***. The court of appeals did cite another OMB guidance promulgated in 1987. App. A at 7a – 8a. The 1987 OMB guidelines addressed the application of the Privacy Act to new software technology that captures lists of telephone calls. Those guidelines said that "[i]t should be noted that the Privacy Act does not require that the record be unique to the individual, only that it be 'about' him or her and include his or her name or other identifying particulars. App. D at 37a.

Inexplicably, the court of appeals contradicted its own core holding that only *uniquely* identifying information is protected. The court of appeals agreed with the guidance that "the Privacy Act's definition of record is thus not limited to purely unique . . . identifying information, as telephone numbers can be protected." App. A at 8a. The court of appeals' agreement stands in stark contrast to its holding that "the duty titles in this case are not "identifying particulars." App. A at 7a.

There is no discernible difference between a telephone number and a duty title. Nobody keeps either indefinitely, and they tend to change over time. It is difficult to reconcile the court of appeals' treatment of a telephone number versus a duty title. According to that rationale, the response in this case would have been a protected record if the petitioner had been identified by

his phone number rather than his duty title. That distinction makes no sense.[9]

The 1987 OMB guidelines addressed the application of the Privacy Act to new software technology that captures lists of telephone calls. Those programs were called "call detail reports" or "call accounting reports" could list all local and long distance calls to and from a particular number or phone extensions as well as the length and time of the calls. App. D at 35a – 36a.

The OMB guidance said that such phone records by themselves are not protected by the Privacy Act but they can become a protected record when linked with other informaion to identify the person making the calls.[10] The link is created when an agency assigns an individual a

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9. The contradiction runs deeper. The OMB said that "a telephone number could be shared by several individuals and still meet the Privacy Act "record" definition." App. D at 37 a (52 Fed. Reg. 12990-12991 (4/20/87) (emphasis added). The court of appeals held that a duty title is not unique because several people could hold the same one at the same time. App. A at 7a.

10. In that regulation, the OMB said that

> ... a telephone number is a record within the meaning of the Privacy Act [depending] upon how the telephone number is maintained. Standing alone, a telephone number is not a Privacy Act record. To achieve the status of a Privacy Act record, a telephone number must be maintained in a way that links it to an individual's name or some other identifying particular such as Social Security Account Number.

App. D at 36a – 37a. (52 Fed. Reg. 12990-12991).

specific phone number.[11] Then, the list of calls to and from that particular number can be linked to the person assigned that number. When the phone number is cross referenced with a phone directory, then the person could be identified.

The court of appeals obliquely distinguished a phone number from the duty title in this case by misstating the guideline. The court of appeals said "[t]he regulation states that identifying information alone, unless ***accompanied*** by a link between the identifying information and a specific individual is insufficient to make a record protected." App. A at 8a (emphasis added). That was a mis-statement of the guideline which does not even contain the word "accompanied." The court of appeals implied that a record must have both an identifying particular *and* a link. That dual requirement is contrary to the plain reading of the statute. By definition, an identifying particular *is* the link to a person's identity.

In the OMB example, the phone number was both the identifying particular and the link that could lead to a person's identification. The court's own examples of unique duty titles did not have both. Thus, the court

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11. In that regulation, the OMB said that

> When an agency assigns a specific phone number to an employee and maintains that information in a way that the name and number are inseparably connected, there is a sufficient identification linkage that a Privacy Act record is created.

App. D at 37a. (52 Fed. Reg. 12990-12991).

contradicted its own holding and then mis-stated the OMB guidance.

In attempting to explain the result, the court of appeals just restated the definition of a record rather than explain its contradiction. The court of appeals said that "the regulation confirms what has been recognized by other courts: To be a Privacy Act record, the information must be both (1) "about" the individual and (2) linked to that individual by name or identifying particular." App. A at 8a. That comment was obfuscatory. It did not explain how a *non-unique* telephone number can be a protected record, but a duty title cannot. Neither is unique in the long term but both can be easily linked with other information to identify an individual.

While the court of appeals agreed with the 1987 Guidance that a *non-unique* telephone number can be an "identifying particular," it did not mention the 1987 guidelines that said (1) "a record can include as little as one descriptive item about an individual", (2) "a record . . . includes individual identifiers in any form," and (3) "identifying particulars are not always unique." App. C at 33a-34a. Again, the contradictions are inexplicable.

C. The Relationship with the Freedom of Information Act.

The decision below stands in stark contrast to this Court's decisions in construing the same privacy issue under the Freedom of Information Act (FOIA). 5 U.S.C. § 552, *et seq.*, i.e., whether identifying information in a document can be linked to identify a person. The court

of appeals went to considerable effort to distinguish this Court's decision in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). The court of appeals said *Rose* was a FOIA decision that does not apply to a Privacy Act case. App. A at 12a – 17a.

This Court should grant this Petition to decide whether the relevant portions of the Privacy Act and FOIA should be construed *in pari materia*. The court of appeals ignored the close connection between the two statutes and the fact that Congress intended to protect varying degrees of personal privacy. The definition of an "identifying particular" should be similar to the definition of "personal identifying information" as used by this Court in *Rose*.

The issue in *Rose* was whether release of disciplinary records from a cadet Honor Board at the Air Force Academy was exempt under FOIA Exemption 6 as an unwarranted invasion of personal privacy. [12] In *Rose*, this Court showed a keen awareness that personal identifying information could be used to identify a person and invade their privacy. [13] This Court recognized that even with

12. "[T]he consequences of exposure of identity can admittedly be severe," *Rose* at 381, and "identification of disciplined cadets ... could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities such as loss of employment or friends." *Id.* at 377.

13. The facts in *Rose* and this case are similar. Both involve summaries of military disciplinary findings. In *Rose*, law review editors (former cadets) were writing an article on the Honor Code at the U.S. Air Force Academy. They filed a FOIA suit to obtain case summaries of disciplinary hearings. The students specifically asked that all personal identifying information be deleted. *Rose* at 56.

names redacted, other personal identifying information could lead to the person's identity and trigger FOIA Exemption 6.

The Air Force opposed any release, and therefore appealed *Rose* to this Court. *Rose* at 378. In fact, it was the Air Force's arguments that prompted this Court to recognize the danger that linkage of personal identifying information poses to individual privacy. *Rose* at 360. *Rose* held that the danger could be eliminated if names and other personal identifying information were redacted. *Id.* at 380-81. Any doubt about whether redacting would protect personal privacy had to be resolved in favor in favor of protecting privacy. *Rose* at 381.[14]

The Privacy Act was passed three weeks after Congress amended FOIA in the post-Watergate environment in which Congress was making government documents available to the public while protecting personal privacy. Pub. L. 93-502 § 4; Pub. L. 93-579. A purpose common to both statutes is the protection of personal privacy. Privacy protection was the *raison d'etre* for the Privacy Act. FOIA Exemption 6 speaks to preventing "a clearly unwarranted invasion of personal privacy." They are codified under title 5 as sections 552 and 552a, virtual bookends. Remarks on the Senate floor showed the close relationship between the two statutes.

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14. "[I]t sufficed to protect privacy at this stage in these proceedings by enjoining the District Court ... that if, in its opinion, deletion of personal references and other identifying information is insufficient to safeguard privacy, then the summaries should not be disclosed to respondents." *Rose* at 381.

> Mr. Kennedy. Mr. President, last fall Congress enacted two bills designed to have a significant impact on the Federal Government's handling of information: the Privacy Act, and the Freedom of Information Amendments of 1974. * * * These laws are not conflicting in intent or purpose. The Freedom of Information Act had always recognized the Government's authority to withhold information whose disclosure would constitute a clearly unwarranted invasion of personal privacy. And the Privacy Act was drafted to avoid interference with the free flow of information to the public required to be released by the Freedom of Information Act.

Legislative History at 1173. The overriding purpose of the 1974 FOIA Amendments was to make it more difficult for agencies to withhold documents. The Amendments' "basic purpose reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Rose* at 360-361. However, those amendments did not disturb Exemption 6 which since 1966 (Pub. L. 89-554, 80 Stat. 383) had exempted the production of "personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552a(b)(6).

Three weeks after the passage of those FOIA amendments, Congress passed the Privacy Act to regulate the collection, maintenance, use, and dissemination of an individual's personal information by federal government agencies. *See* 5 U.S.C. § 552a *et seq.*

The Privacy Act has several direct references to FOIA.[15] Congress directed that any document releasable under FOIA was *ipso facto* releasable under an exemption to the Privacy Act. 5 U.S.C. § 552a(b)(2). In the context of this case, that section means that if an agency decided that the release of a "personnel, medical or similar file" would not be exempt under FOIA Exemption 6 as unwarranted invasion of personal privacy, 5 U.S.C. § 552(b)(6), then the Privacy Act exemption would also allow the release of the document. 5 U.S.C. § 552a(b)(2).

Given this express Congressional coordination between the two statutes, the statutes are more similar than dissimilar. Congress could not have intended the respective zones of protected personal privacy to be very different. While FOIA does not statutorily define the term "personal identifying information," this Court has used the term "personal references and other identifying information" in construing FOIA Exemption 6. *Rose* at 358, 381.

The petitioner submits that an "identifying particular assigned to the individual" in the Privacy Act should have essentially a synonymous – if not identical – meaning with the term "personal identifying

15. The Privacy Act gives an exemption when "disclosure of the record would be ... (2) required under Section 552 of this title [i.e., the Freedom of Information Act.]" 5 U.S.C. § 552a(b)(2). In another direct link, the Privacy Act incorporates the FOIA definition of "agency" by referring to "section 552(e) of this title." In a third connection, the Privacy Act prohibits agencies from relying either FOIA or the Privacy Act to withhold a document that is otherwise accessible under the other statute. 5 U.S.C. § 552a(t).

information" as used by this Court in *Rose*. Both terms should be construed *in pari materia* to include any information that can – as a practical matter – be used to identify an individual. If subtle differences exist, they could not be as divergent as the definition fashioned by the court of appeals.

> The rule of *in pari materia* - like any cannon of statutory construction – is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a "later act can ... be regarded as a legislative interpretation of an earlier act ... in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting, and is therefore entitled to great weight in resolving any ambiguities and doubts ... [I]t necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject ... Given this underlying assumption, the rules application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time.

Erlenbaugh v. United States, 409 U.S. 239, 244 (1972). Here, the Privacy Act and the 1974 FOIA amendments both protect varying degrees of personal privacy by

prohibiting the release of government documents that contain identifying information.[16]

The court of appeals attempted to distance *Rose* and FOIA. It said that the definition of "personal and medical and similar files" in FOIA Exemption 6 "does not translate well" into the Privacy Act's definition of a "record." App. A at 16a. That point is admitted. *See Tobey v NLRB*, 40 F.3d 469 (D.C. Cir. 1994). However, those terms are not the issue here.

The initial question – common to both statutes – is whether any of those documents (records, personnel files, medical files, etc.) can be released to the public. The answer requires a search of the document for information that would identify an individual. Under the Privacy Act, the search is for "identifying particular assigned to the individual." Under FOIA, the search is for "personal identifying information." Those searches are essentially identical. That common demoninator is why the terms "an identifying particular" and "personal identifying information" should be construed to be *in pari materia*. At that point, *Rose*'s rationale about the dangers to privacy becomes applicable to the Privacy Act.

At the next step, the respective inquires then become divergent. Under the Privacy Act, the presence of any

16. The court of appeals said that "[t]he Privacy Act and FOIA have "an entirely different framework." App. A at 14a. The "[c]ourts have noted that the two statutes have two very different goals which result in different outcomes." App. A at 15a. "This difference demonstrates that the two statutes work fundamentally differently and that especially in this context, the determination of what is a record for the Privacy Act, the Exemption 6 framework is inapplicable." App. A at 16a.

"identifying particulars" makes the document a protected record and not releasable – without consent or an exemption. Under FOIA Exemption 6, the presence of "personal identifying information" takes the inquiry to the next level – would a release be an unwarranted invasion of personal privacy. *Rose* at 372. That question is answered by balancing individual privacy rights with the public's right to know. *Id.* In striking that balance, this Court has shown a keen awareness of the risks to privacy posed by the release of personal *non-unique* identifying information. To eliminate that risk, this Court acknowledged in *Rose* that redacting can protect personal privacy. *Rose* at 381. Hence, the balancing test can be tipped in favor of disclosure when all personal identifying information is redacted. *Rose* at 381.[17]

In *Rose*, this Court appreciated the dangers to privacy when individual can be identified from information in a document. That danger extends beyond what the general public could discern from the documents. It extends to people with personal knowledge of the underlying facts.[18] Given this Court's broad

17. Those inquiries can have different results. However, under one scenario, those different outcomes become the same. For example, if a document is a record under the Privacy Act, it cannot be released. The same document (if a personnel or similar file) could be released under FOIA Exemption 6 if its disclosure would not cause "a clearly unwarranted invasion of personal privacy." If releasable under FOIA, then it can be released under an exemption to the Privacy Act. 5 U.S.C. § 552a(b)(2). Hence, different outcomes can become the same.

18. This Court held that "what constitutes identifying information regarding a subject cadet must be viewed not only (Cont'd)

protection of personal privacy under FOIA Exemption 6 and the closeness of those statutes, Congress obviously intended for the Privacy Act's definition of an "identifying particular" to be similar to "personal identifying information" as used in *Rose*.

Rose simply illustrates that this Court has been very realistic in recognizing that *non-unique* identifiers can lead to an invasion of privacy. That recognition resulted from this Court's gleaning what Congress meant by "a clearly unwarranted invasion of personal privacy."[19] Congress obviously transported that same concern into the Privacy Act's protection of records that identify a person by name or other "identifying particular assigned to the individual."

(Cont'd)

from the viewpoint of the public but also from the vantage of those who would have been familiar [with the underlying facts or investigation]." *Rose. Id.* at 380. In other words, information that might be meaningless to the public a former colleague (cadets and/or instructors) may realize who the information is about. Hence, the redaction process had to carefully filter out information that both the general public ***and*** those individuals with some personal knowledge of the underlying facts.

19. Many non-unique identifiers can be cross referenced with other readily-available information to identify a person. The functional use of such *non-unique* information cannot be denied. Ironically, a truly unique identifier, like a fingerprint or a voice print, would only be useful to law enforcement and perhaps a few tech savvy people. On the other hand, non-unique identifying information (like duty titles, name of employer, telephone number, address, etc.) could be extremely useful to anyone with access to the Internet, a phone book, city directory, etc.

This Court's sensitivity to the risks to privacy stands in stark contrast to the holding below. The court of appeals deemed it irrelevant that 13 people had their names published in a local newspaper in a very humiliating article. App. A at 18a. The court of appeals avoided any consideration of the consequential damages to privacy with its new fangled definition of a "record" under the Privacy Act.

That result would not have happened under FOIA. Congress did not intend such different outcomes from two statutes that are tied so closely together. Nothing in the Privacy Act or its legislative history indicates that Congress had a "*c'est la vie*" attitude about breaches of personal privacy.

D. Conflict in the Circuits.

While the other circuits have had some variations in the definition of a record,[20] no other circuit has held that

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20. The circuit courts have used various definitions of a record. Under any of them, the response here is a protected document.

> [The D. C. Circuit] observe[d] that the definitions of "record" offered by other circuits appear either too broad or too narrow. The Third Circuit, for example, has stated that information "could still be included within a 'record' as statutorily defined and protected by the Act if that piece of information were linked with an identifying particular (or was itself an identifying particular) and maintained within a system of records." *Quinn v. Stone*, 978 F.2d 126, 133 (3d Cir. 1992). To the extent that this definition fails

(Cont'd)

the Privacy Act protects only documents that *uniquely* identify only a single individual. The court of appeals has tilted the gyroscope that has steered the Privacy Act for 33 years. For these reasons, this decision certainly merits review by this Court.[21]

(Cont'd)

> to require that information both be "about" an individual and be linked to that individual by an identifying particular, we reject it. For information to qualify as a record it must, at a minimum, satisfy both requirements. We similarly reject, as too narrow, the Ninth and Eleventh Circuits' definitions which require that information in the records "reflect some quality or characteristic" of the individual involved. *Unt*, 765 F.2d at 1449; *Boyd v. Secretary of the Navy*, 709 F.2d 684, 686 (11th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984). So long as the information is "about" an individual, nothing in the Act requires that it additionally be about a "quality or characteristic" of the individual.

NLRB v. Tobey, 40 F.3d 469, 472 (D.C. Cir. 1994).

21. Again in *U.S. Department of State v. Ray*, 502 U.S. 164 (1991), this Court came down on the side of FIOA Exemption 6 when there was some risk of breaching personal privacy. This Court said it was "persuaded, however, that several facts, when considered together, make the privacy interest more substantial than the court of appeals recognized." *Id.* at 175. Although disclosure of such personal information constitutes only a *de minimis* invasion of privacy when the identities of the interviewees are unknown, the invasion of privacy becomes significant when the personal information is to particular [individuals]." *Ray, Id.* at 175-176.

E. Impact on the Regulatory Framework. The court of appeals made the erroneous comment that the petitioner's view of the Act "would eviscerate the entire response framework the Air Force has established with regard to [sending] complainants [the results of the investigation]" and "[t]he Air Force would not have been able to respond to Bryant." App. A at 17a-18a.

On the contrary, the framework prohibits any disclosure with the exception of the one regulation cited below. In the case of a third-party complainant (as opposed to a complainant), the same IG regulations have a totally different result. It states that a third-party complaint gets nothing more than an acknowledgment without a Privacy Act release from the subject.[22] The different responses cannot be reconciled with the Privacy Act. The petitioner's rights under that Act do not vary depending on whether Bryant was a first-party or a third-party complainant.

Further, if an IG investigation results in non-judicial punishment for an accused, the victim is not advised of

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22. Third-party complainants are not entitled to personal information or other

> information not releasable to the public under the FOIA/Privacy Act (PA). To release specifics concerning a case, a consent to release must be acquired from the affected party. If the affected party does not give their consent to release findings to the third party, IG's must inform the third party, the matter will be reviewed but specifics will not be released due to PA restrictions.

AFI (Air Force Instruction) 90-301 ¶ 1.41.7.2 (1/30/01). *See also* AFI 90-301 ¶ 1.41.7.1.

the punishment. AFI (Air Force Instruction) 51-201 ¶ 7.15, Administration of Military Justice. Hence, non-disclosure of documents is the predominant practice.

The Air Force cited a regulation that required it to send a response to a complainant. AFI 90–§§ 2.61, 2.49 (1/30/01). Whatever that regulation means, it does not trump the Privacy Act.

Besides, if the Air Force had wanted to routinely send the results of IG investigations to complainants, it could have invoked the "routine use" exemption in the Privacy Act, 5 U.S.C. § 552a(b)(3), by making the appropriate publication in the Federal Register. 5 U.S.C. § 555a(e)(4)(D). The Air Force did not plead that or any other exemption.

CONCLUSION

For all the foregoing reasons, the petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 21, 2007

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-61050

ROBERT EARL PIERCE,

Plaintiff-Appellant,

v.

DEPARTMENT OF THE UNITED STATES AIR FORCE,

Defendant-Appellee.

December 21, 2007, Filed

JUDGES: Before DAVIS, BARKSDALE and PRADO, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

In this appeal, Plaintiff-Appellant Robert Pierce ("Pierce") challenges the district court's summary judgment rendered against him and in favor of Defendant-Appellee Department of the Air Force (the "Air Force") concluding that the Air Force did not violate Pierce's rights under the Privacy Act of 1974, 5 U.S.C. § 552a(b) (the "Privacy Act"). The district court held that the documents at issue were not "records" contained

within a "system of records" for purposes of the Privacy Act and granted summary judgment on that ground. We agree with the district court and affirm.

I.

In February 2001, Col. (Ret.) Joe Bryant ("Bryant"), a former pilot in the 186th Air Refueling Wing of the Mississippi Air National Guard, once stationed at the Key Field Air National Guard Base in Meridian, Mississippi, filed a complaint that alleged wrongful conduct and improprieties by several officers of his unit. Included in the complaint were allegations against Pierce.[1]

In February 2003, Colonel Kenneth Emmanuel ("Emmanuel") was designated by the Air Force Inspector General to investigate some of Bryant's allegations, and he did so over a period of several months. On May 31, 2004, Emmanuel issued his findings in a Report of Investigation ("ROI"). Additionally, and

1. Bryant alleged that Pierce improperly disposed of government property, cheated on examinations and research papers, wrongfully fraternized with, had an unprofessional relationship with, or sexually harassed a subordinate enlisted female, wrongfully referred one of his subordinate pilots for a mental health evaluation, wrongfully used aircraft for unauthorized flights and funds for improper expenditures, wrongfully received Air Force wings, wrongfully manipulated the merit selection process, wrongfully falsified or failed to update his military medical records and failed to take sick leave, and wrongfully threatened subordinates with unspecified adverse actions if they cooperated with investigators.

pursuant to regulation, Emmanuel prepared a Summary Report of Investigation ("SROI"), a version of the ROI that omits names and personally-identifying information of individuals in the report. Air Force Instruction (AFI) 90-301, §§ 2.61, 2.49 (January 30, 2001). In the SROI, Emmanuel did not name the officers against whom Bryant lodged his complaints (including Pierce). Instead, consistent with regulation guidance, he identified them by duty titles. *Id.* § 2.49, Figure 2.6 ("Do not use names in the SROI. Use duty titles. . . ."). Pertinently, Pierce was referred to in the SROI as C-26 Program Manager and Counterdrug Coordinator.[2]

In July 2004, Colonel Ronnie Rogers ("Rogers") took over and assumed the responsibility for closing the investigation of Bryant's allegations. In the course of closing the investigation, he determined that Bryant was a "complainant" per Air Force regulations. As a "complainant" for the allegations, Bryant was entitled to a final response letter and an SROI. *Id.* § 2.61.4 (Complainant "will receive a final response, in writing, with the findings of the investigation and a copy of the SROI (if available)."). On October 15, 2004, Rogers sent Bryant the final response letter and a copy of the SROI, in compliance with the Air Force regulations he considered applicable. After receiving the final response letter and the SROI, Bryant or his wife allegedly leaked information contained in those documents and informed the press that Pierce was the individual listed under the duty titles C-26 Program Manager and Counterdrug

2. Pierce was C-26 Program Manager from 1996 to 2001, after which he became a Counterdrug Coordinator.

Coordinator. On October 22, 2004, *The Meridian Star* and *The Clarion Ledger* reported information from the final response letter and SROI and listed Pierce by name as a subject of the investigation.

Pierce filed suit against the Air Force alleging a violation of the Privacy Act. The parties later filed cross-motions for summary judgment. The district court held that the final response letter and SROI provided to Bryant were not records protected by the Privacy Act and dismissed the suit. Pierce now appeals.

II.

A. STANDARD OF REVIEW

We review a grant of summary judgment *de novo*, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir.2000). "Summary judgment is proper when the evidence reflects no genuine issues of material fact and the non-movant is entitled to judgment as a matter of law." *Id.* (citing Fed.R.Civ.P. 56(c)). "We may affirm a summary judgment on any ground supported by the record, even if it is different from that relied on by the district court." *Lozano v. Ocwen Federal Bank, FSB*, 489 F.3d 636, 641 (5th Cir.2007) (quoting *Holtzclaw v. DSC Commc'ns Corp.*, 255 F.3d 254, 258 (5th Cir.2001)) (internal quotation marks omitted).

Appendix A

B. DISCUSSION

To establish that an agency failed to comply with the Privacy Act, a plaintiff must demonstrate that: (1) the information is a "record" within a "system of records;" (2) the agency disclosed the information; (3) the disclosure adversely affected the plaintiff; and (4) the disclosure was willful or intentional. 5 U.S.C. § 552a(g); *Jacobs v. National Drug Intelligence Center*, 423 F.3d 512, 516 (5th Cir.2005). The Air Force moved for summary judgment on grounds that the summary judgment record demonstrated that Pierce could not establish prongs one, two, or four. The district court held that Pierce could not satisfy the first prong because duty titles used in lieu of names were not "identifying particulars," and thus the use of duty titles did not make the final response letter and SROI "records" within a "system of records."[3] Specifically, the district court found that the response that Bryant received did not include Pierce's name and held that a duty title is not unique to an individual because many people have the

3. The Privacy Act defines "record" as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or voice print or a photograph." 5 U.S.C. § 552a(a)(4). The Privacy Act defines "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." *Id.* § 552a(a)(5).

same or similar duty titles. The district court reasoned that duty titles change over time and that individuals typically have both a predecessor and a successor at any specific duty title. Thus, the district court found that although the newspapers were able to connect Pierce to the allegations against him, the newspapers could not have made such a connection without information found outside of the final response letter and SROI. As such, the final response letter and the SROI were not protected records per the Privacy Act, and Pierce's claim failed to meet the first prong. As discussed below, we agree that the newspapers could not have identified Pierce without additional information not released by the Air Force and that the duty titles released here are not the equivalent of names of particular individuals.

Appellant first relies on the plain language of the Privacy Act which states that a "record" is "any item . . . that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. § 552a(a)(4). Appellant argues that this language suggests that duty titles are the equivalent to the names of particular individuals. We disagree. Although the Privacy Act protects more than just documents that contain a person's name, it does not protect documents that do not include identifying particulars. Here, the district court found that the duty titles were not numbers, symbols, or other identifying particulars. Similarly, the district court found that duty titles were not comparable to captured immutable characteristics such as finger or voice prints or

photographs. The district court reached these conclusions because an individual's duty title changes over time, because multiple people can concomitantly have the same or similar duty titles, and because each individual has predecessor and successor holders of the same duty titles. We agree with the reasoning and conclusions of the district court. In circumstances where duty titles pertain to one and only one individual, such as the examples of identifying particulars provided in the statutory text (finger or voice print or photograph), duty titles may indeed be "identifying particulars" as that term is used in the definition of "record" in the Privacy Act. For the reasons detailed by the district court, however, the duty titles in this case are not "identifying particulars" because they do not pertain to one and only one individual. *See, e.g.*, 32 C.F.R. § 806b.45 (2007) (permitting disclosure of an individual's past and present position title and stateside duty assignments without written consent of that individual); 32 C.F.R. Pt. 505, App. H (defining "personal identifier" as "name, number, or symbol that is unique to an individual, usually the person's name or SSN"). And the plain language of the Privacy Act does not support the conclusion that duty titles are identifying particulars.

Appellant next relies on an Office of Management and Budget regulation to argue that to be a "record" under the Privacy Act, the information does not have to be unique to an individual, only that it be "about" that individual. Guidance on the Privacy Act Implications of "Call Detail" Programs, 52 Fed.Reg. 12,990-91 (April 20, 1987). This regulation was promulgated to provide

guidance to agencies creating "call detail programs" that collect and use information relating to their employees' use of long distance telephone systems. *Id.* at 12,990. The regulation provides that call detail records that contain only telephone numbers are not records under the Privacy Act, but that when linked with a name they become such records. Appellant correctly notes that the Privacy Act's definition of "record" is thus not limited to purely unique or immutable identifying information, as telephone numbers can be protected. *Id.* at 12,991.

The regulation, however, does not support the conclusion that the final response letter and SROI are records protected by the Privacy Act. The regulation states that identifying information alone, unless accompanied by a link between the identifying information and a specific individual, is insufficient to make a record protected. *Id.* ("Standing alone, a telephone number, is not a Privacy Act record. To achieve the status of a Privacy Act record, a telephone number must be maintained in a way that links it to an individual's name or some other identifying particular such as a Social Security Account Number. When an agency assigns a specific phone number to an employee and maintains that information in a way that the name and number are inseparably connected, there is sufficient identification linkage that a Privacy Act record is created."). Thus, the regulation confirms what has been recognized by other courts: To be a Privacy Act record, the information must be both (1) "about" the individual and (2) linked to that individual by name or identifying particular. *See, e.g., Tobey v. N.L.R.B.*, 40 F.3d

469, 471 (D.C.Cir.1994). The final response letter and SROI sent to Bryant included the allegations and other information "about" Pierce. This satisfies the first prong of the definition of "record." The second prong, however, is unsatisfied. As explained above, the duty titles in this case do not qualify as identifying particulars. As such, the final response letter and SROI did not include the requisite linkage to Pierce by his name or other identifying particular. The final response letter and SROI are thus not Privacy Act records.

In support of the argument that duty titles are not unique to an individual, Appellee points out that at the time the newspaper articles were printed Pierce no longer held the duty title of C-26 Program Manager, his duty title prior to 2001. The newspaper articles were printed on October 22, 2004. At that time Pierce held the duty title of Counterdrug Coordinator, his assignment after his C-26 Program Manager position, and against which only one allegation from the final response letter and SROI pertained. Thus, Pierce's duty title had changed, and all but one of the eight allegations listed in the October 15, 2004 final response letter pertained to a duty title he no longer held. As such, Appellee argues that the link to Pierce was not so simple as identifying the current holder of the listed duty titles because that inquiry would not have identified Pierce except for as to one of the allegations. The inclusion of one allegation involving Pierce's then-current duty title does not mean that the report specifically identified only Pierce for this allegation, because a person reading the report would have to know which allegations pertained

to military personnel in their current positions instead of their previous positions. Had the report included both duty titles and dates for the allegations, the report very well might have linked specifically to Pierce because only one person could have held his duty title on those dates. But simply listing allegations by duty titles without specifying when the personnel involved held those duty titles is insufficient to turn Pierce's then-current duty title into an "identifying particular."

To answer this argument, Appellant relies on *Quinn v. Stone*, 978 F.2d 126 (3d Cir.1992). In *Quinn*, the court determined that data stored in a hunting records database and accessible by the names of the hunters were Privacy Act records, despite the fact that some of the information was out-of-date. *Id.* at 132. ("As this case demonstrates, the meaningful privacy interest in a particular piece of information may be lessened by the passage of time, but such an interest is unlikely to be extinguished. We conclude that this out-of-date home address was meaningful information and was protected by the Privacy Act."). The hunting database stored information regarding where and when the plaintiffs had been hunting. Critically, the stored information in question linked the plaintiffs' names to their phone numbers and addresses. In relying on *Quinn*, Appellant both fails to respond to the relevant Appellee argument and again fails to satisfy the second prong of the definition of "record" under the Privacy Act. Appellee's argument is that duty titles are not identifying particulars because they change over time. In the instant case, the duty title for all but one of the allegations was

no longer temporally accurate. The *Quinn* holding, that an individual may have a privacy interest in an outdated piece of information, does not respond to Appellee's argument. It is true that an individual may have a privacy interest in outdated information, but that privacy interest is limited to instances where the outdated information is linked to the individual by name or identifying particular. *Id.* at 133 (holding that the definition of "record" pertains to "information about an individual that is linked to that individual through an identifying particular"). Thus, Appellant repeats the mistake addressed above and focuses on the first requirement of a Privacy Act record while failing to fulfill the second. It is true that the allegations are "about" Pierce, but the duty titles in this case do not link the allegations to him.

In holding that the documents were not "records," the district court relied on *Fleming v. United States R.R. Ret. Bd.*, No. 01-C-6289, 2002 WL 252459 (N.D.Ill. Feb. 21, 2002). In that case, an agency summary report, which listed the plaintiff by a description of his job rather than by his name, was published on its website listing information regarding an investigation of whether the plaintiff was conducting his private law practice during official government time. *Id.* at *2. Importantly, the investigation at issue was the only one described in the report, such that other employees at the agency would have no trouble identifying the subject. *Id.* ("[H]is was the only disciplinary case described in [the] . . . report and . . . fellow employees who had been questioned . . . knew that plaintiff was being investigated."). The

plaintiff claimed that the summary report was a Privacy Act record. The court held that the information did not constitute a "record" because the disclosure was "about" the plaintiff but was not linked to him by his name or identifying particular. *Id.* The *Fleming* court acknowledged that the Privacy Act definition of "record" includes the words "such as" before the list of example identifying particulars (finger or voice print or photograph), which indicates the list is neither exclusive nor exhaustive. The court held, however, that the information in question (plaintiff's job description) "would have identified plaintiff only to an individual who had *other information* that would have caused that individual *to infer* from the report that plaintiff was the subject of the investigation." *Id.* (emphasis added). *Fleming* supports that information "about" an individual is not a Privacy Act record unless it is linked to that individual by name or identifying particular and that a description of an individual's job is not an identifying particular. *Id.* Thus, even when those with inside knowledge are able "to infer" who an undisclosed individual is, the fact that the insiders have to use "other information" to do so does not justify a conclusion that the released information is a "record."

Appellant argues that *Fleming* is inconsistent with *Dep't of the Air Force v. Rose*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). In *Rose*, law review editors brought an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel disclosure of case summaries of service academy honor and ethics hearings with personal references and other identifying material

deleted. 425 U.S. at 355, 96 S.Ct. 1592. The case turned on exemption 6 to FOIA, which exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) ("Exemption 6"). The district court concluded that Exemption 6 was inapplicable because

> disclosure of the summaries without names or other identifying information would not subject any former cadet to public identification and stigma, and the possibility of identification by another former cadet could not, in the context of the Academy's practice of distribution and official posting of the summaries, constitute an invasion of personal privacy proscribed [by Exemption 6].

Rose, 425 U.S. at 357, 96 S.Ct. 1592. The Court of Appeals disagreed with this approach, and held that the district court and the agency must produce the documents in court and redact the records so as to "delete personal references and all other identifying information." *Id.* at 358, 96 S.Ct. 1592 (citing *Rose v. Dep't of the Air Force*, 495 F.2d 261, 267 (2d Cir.1974)). The Supreme Court granted certiorari and agreed with the Court of Appeals that the documents should be produced and redacted, and stated, *inter alia*, that "what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar, as fellow cadets or Academy staff. . . ." *Rose*, 425 U.S. at

380, 96 S.Ct. 1592. Appellant argues that this passage, describing the subjective nature of redaction in an Exemption 6 context, supports the conclusion that there was a Privacy Act violation in the instant case because Bryant's knowledge was not taken into account when the final response letter and SROI were sent to him. Appellant's reliance on *Rose* is unpersuasive.

Most importantly, *Rose* does not apply in the context of the instant Privacy Act case. *Rose* deals with the privacy interest of an individual under a FOIA exemption that the Supreme Court has stated should be construed narrowly. *See United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989) ("Congress formulated a system of clearly defined exemptions to the FOIA's otherwise mandatory disclosure requirements. . . . Consistent with the [FOIA] goal of broad disclosure, these exemptions have been consistently given a narrow compass."); *see also Rose*, 425 U.S. at 366, 96 S.Ct. 1592 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1142 (D.C.Cir.1975)). While the Privacy Act was designed to provide individuals with more control over the gathering, dissemination, and accuracy of agency information about themselves, FOIA was intended to increase the public's access to governmental information and was drafted with a strong presumption for disclosure to allow public scrutiny of government processes. Thus, the language taken from *Rose*, specific to Exemption 6 to FOIA, is not applicable to the Privacy Act, which is an entirely different framework. *See Greentree v. United States Customs Service*, 674 F.2d 74, 76 (D.C.Cir.1982) (stating that the

Privacy Act and FOIA each "has its own functions and limitations"); *Rojem v. United States Dep't of Justice*, 775 F.Supp. 6, 13 (D.D.C.1991) ("[T]here are instances in which the FOIA denies access and the Privacy Act compels release. . . . Thus, the Court must evaluate the Plaintiff's Privacy Act claim independently.") (citations omitted); *see also Simon v. United States Dep't of Justice*, 752 F.Supp. 14, 22-23 (D.D.C.1990) (conducting separate inquiries despite significant overlap of the two statutes). Courts have noted that the two statutes have very different goals which result in different outcomes. *See, e.g., Greentree*, 674 F.2d at 78 ("It is readily apparent . . . that the Privacy Act and FOIA substantially overlap. However, it is apparent also that the two statutes are not completely coextensive; each provides or limits access to material not opened or closed by the other."); *Tobey*, 40 F.3d at 472. With these differences between the statutes in mind, Appellant points to no precedent that supports the use of the *Rose* FOIA Exemption 6 principal in this Privacy Act case.

One court, however, has contemplated applying the Exemption 6 framework in the Privacy Act context. *See Tobey*, 40 F.3d at 472; *New York Times Co. v. National Aeronautics and Space Administration*, 920 F.2d 1002 (D.C.Cir.1990). When comparing "similar files," the document analog in Exemption 6 to "record" under the Privacy Act, the *Tobey* court stated that there was substantial difference between the meanings of the terms. *Tobey*, 40 F.3d at 472. Specifically, to qualify as a "record" under the Privacy Act, the information must be "about" the individual. *Id.* To qualify as a "similar

file" under Exemption 6, on the other hand, the information need only "appl[y]" to the individual. *Id.*; *see also New York Times*, 920 F.2d at 1006 (citing *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 102 S.Ct. 1957, 72 L.Ed.2d 358 (1982)). This distinction is crucial because the "latter category is a broad one, encompassing virtually all data that relate to an individual; the former, however, includes only information that actually describes the individual in some way." *Tobey*, 40 F.3d at 472. This makes sense because under Exemption 6 a broad range of documents are applicable, but there is a limiting second step of weighing the individual's privacy interest versus the interest in public disclosure. 5 U.S.C. § 552(b)(6); *see also New York Times*, 920 F.2d at 1006. Under the Privacy Act there is no such second limiting step; instead, documents are filtered by the limitation ingrained in the definition of "record" that they be both "about" the individual and include his name or identifying particular. 5 U.S.C. § 552a(a)(4); *Tobey*, 40 F.3d at 472 ("The Privacy Act notice requirement provides for no comparable bifurcated analysis that would justify a similarly low threshold for defining 'records.' "). This distinction "is necessary given the different functions that [E]xemption 6 and the Privacy Act fulfill" and illustrates why the Exemption 6 approach "does not translate well to the Privacy Act." *Tobey*, 40 F.3d at 472. This difference demonstrates that the two statutes work fundamentally differently and that especially in this context, the determination of what is a "record" per the Privacy Act, the Exemption 6 framework is inapplicable.

Also, to accept Appellant's reading of *Rose* would eviscerate the entire response framework the Air Force has established with regard to complainants. Complainants will almost certainly know the identity of the person against whom they lodge a complaint. Under Appellant's reading of *Rose*, the Air Force would be required to investigate every complainant as well as the subject of each investigation, to determine whether the complainant could identify the subject before deciding on the response. Using this reasoning, the Air Force should have released little or no information to Bryant because it should have ascertained that Bryant knew Pierce's identity and would likely leak his name to the press. We are satisfied that *Rose* does not mandate this outcome.

Finally, Appellant relies on *United States Department of State v. Ray*, 502 U.S. 164, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991), another FOIA case regarding Exemption 6, which held that "invasion of privacy becomes significant when the personal information is linked" to a particular individual. *Id.* at 176, 112 S.Ct. 541. In *Ray*, the Court held that the names of individuals should be redacted to protect the privacy interests of those individuals. Even if this FOIA case applied here, it is not helpful to Appellant because the Air Force did not release Pierce's name.

We agree with the district court that the final response letter and SROI released by the Air Force were not "records" within a "system of records" per the Privacy Act. Emmanuel generated the SROI, a type of

report specifically designed to omit identifying particulars, pursuant to Air Force regulation. Later, and again pursuant to regulation, Rogers sent the SROI along with a final response letter to Bryant. The fact that the newspapers made the connection to Pierce and identified him does not establish a Privacy Act violation. If we were to accept Appellant's interpretation of the Privacy Act, the Air Force would not have been able to respond to Bryant about the results of its investigation of activities of persons against whom Bryant complained. To be sure, any update regarding the status of the investigation would have allowed Bryant to divulge information to the press about the individuals being investigated. The Air Force, however, followed its regulation and released information it was required to release after omitting the names and identifying particulars of the subjects of the investigation, and it cannot be held accountable for Bryant's intervening act. The district court correctly granted summary judgment to the Air Force.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DECIDED SEPTEMBER 30, 2006

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:05CV215WSU

ROBERT EARL PIERCE,

Plaintiff,

v.

DEPARTMENT OF THE AIR FORCE,

Defendant.

September 30, 2006, Decided

MEMORANDUM OPINION AND ORDER

HENRY T. WINGATE, Chief Judge.

Before this court are the respective motions of the parties: plaintiff's Motion for Partial Summary Judgment [docket # 61-# 62]; and defendant's Motion for Summary Judgment [docket # 72-# 73]. Both motions rely upon the jurisprudence established by Rule

56(c),[1] Federal Rules of Civil Procedure. Plaintiff comes under Rule 56(a),[2] while defendant invokes Rule 56(b).[3] The plaintiff here is Robert Earl Pierce ("Pierce") and the defendant is the Department of The Air Force ("Air Force"). Plaintiff complains that the Air Force caused him public scorn and embarrassment when a local newspaper connected plaintiff's name to a corruption investigation, said connection premised upon the contents of a protected Air Force document released to the public in violation of the Privacy Act of 1974, Title 5 U.S.C. § 552a(b).[4]

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1. Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[the] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

2. Rule 56(a) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[a] party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may. at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof."

3. Rule 56(b) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[a] party against whom a claim . . . is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

4. The Privacy Act of 1974, 5 U.S.C. § 552a(b) prohibits a federal agency from disclosing "any record which is contained in a system of records ... except pursuant to ... the prior written consent of the individual to who the record pertains."

Appendix B

Background Facts

At the center of this dispute is Col. (Ret.) Joe Bryant, a former pilot in the 186th Air Refueling Wing of Mississippi, once stationed at the Key Field Air National Guard Base, Meridian, Mississippi. Bryant filed a complaint in February 2001, with Adjutant General, Major General James H. Lipscomb III, alleging wrongful conduct and improprieties by the officers of his unit. According to Bryant, various officers had disregarded accurate documentation, certified false evaluation documents and cheated on military examinations, allowed the presence of a liquor store on base, and more.

During the investigation, Bryant provided a written list of allegations against the members of his unit to Colonel Kenneth Emmanuel ("Emmanuel"). Emmanuel was charged by the IG with investigating the allegations. Over a period of several months, Emmanuel interviewed officers of the unit and studied documents.

On May 31, 2004, Emmanuel issued his findings in a Report of Investigation (ROI). Pursuant to the Air Force IG regulation,[5] Emmanuel also completed a Summary Report of Investigation (SROI). The SROI is a version of the ROI which is supposed to omit the names and personal identifying information of the individuals in the report.

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5. Section 2.61 of the Air Force Instruction 90-301.

Appendix B

The SROI in question addressed forty-four (44) allegations raised by Bryant. The SROI stated whether each allegation had been substantiated or not substantiated. The SROI did not mention the names of any of those investigated; instead, the document identified those investigated by duty titles, such as: Air Operations Officer, 186th Air Refueling Wing Commander, Air Operations Officer, Squadron Commander, 186th Logistics Group Commander, C-26 Program Manager, Counterdrug Coordinator, 186th ARW Executive Officer, Lieutenant Colonel, 186th Air Refueling Wing Comptroller, 186th ARW Instructor Pilot, etc.

Before closing the case, the Air Force sent to Joe Bryant a final written response regarding the findings of the investigation. According to the Air Force, Bryant was eligible to receive such a response because he was the first-party complainant.[6]

Consequently, on October 22, 2004, *The Meridian Star* and *The Clarion-Ledger*, Mississippi newspapers of wide circulation, reported the findings of the investigation and listed the names of the subjects of the investigation. According to the Air Force, Bryant's wife furnished a copy of the Air Force's final response to the editor of *The Meridian Star.*

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6. A complainant is any individual making an allegation against an Air Force member, program, or organization. Complainants will receive a final response from the level that conducted the investigation unless otherwise directed by higher-level IG. 2.61.4 of the Air Force Instruction 90-301.

The Meridian Star treated the Air Force report as a top story. In its front-page article on the matter, *The Meridian Star* listed alleged misconduct and the names of persons suspected as perpetrators. The plaintiff's name was mentioned multiple times, as follows: "[T]he most substantiated allegations—seven—were against Col. Earl Pierce, a Newton County resident. The allegations involved wrongfully disposing of government property, cheating on professional military tests, wrongfully fraternizing and or sexually harassing a subordinate enlisted female; wrongfully referring a subordinate pilot for a mental health evaluation; wrongfully using government aircraft for unauthorized flights; and falsifying or failing to update military medical records."

Relevant Law and Analysis

Jurisdiction

Pierce brings his claim under federal law, claiming his rights under the Privacy Act of 1974 were violated. This court has subject matter jurisdiction over this dispute pursuant to the authority provided by Title 5 U.S.C. § 552a(g)1.[7]

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7. Subsection (g)(1) recognizes a civil action for agency misconduct fitting within any of the four categories (the fourth ... being a catchall), 5 U.S.C. § 552a(g)(1)(A)-(D) ... The first two categories cover deficient management of records: subsection (g)(1)(A) provides for the correction of any inaccurate or otherwise improper material in a record, and subsection (g)(1)(B) provides a right of access against any agency refusing to allow an individual to inspect a record kept on him.

Appendix B

Summary Judgment Standard

Summary judgment is appropriate where the facts and law as represented in the pleadings, affidavits and other summary judgment evidence show that no reasonable trier of fact could find for the nonmoving party as to any material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 411 (5th Cir.2003); *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 877 (5th Cir.2002). "A fact is 'material' if it 'might affect the outcome of the suit under governing law.' " *Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir.2001). The nonmoving party may not rest upon mere allegations or denials in the pleadings but must present affirmative evidence, setting forth specific facts, to show the existence of a genuine issue for trial. *See Celotex Corporation*, 477 U.S. at 322-23, 106 S.Ct. 2548; *Anderson*, 477 U.S. at 257, 106 S.Ct. 2505; *Matsushita Electric Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). All the evidence must be construed "in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes." *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir.1996); *Brown v. City of Houston*, 337 F.3d 539, 540 (5th Cir.2003); *Daniels v. City of Arlington*, 246 F.3d 500, 502 (5th Cir.), cert. denied, 534 U.S. 951, 122 S.Ct. 347, 151 L.Ed.2d 262 (2001). Furthermore, only reasonable inferences can be drawn

from the evidence in favor of the nonmoving party. *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 469 n. 14, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). "If the [nonmoving party's] theory is ... senseless, no reasonable jury could find in its favor, and summary judgment should be granted." *Id.* at 468-69, 112 S.Ct. 2072. The nonmovant's burden is not satisfied by "some metaphysical doubt as to material facts," conclusory allegations, unsubstantiated assertions, speculation, the mere existence of some alleged factual dispute, or "only a scintilla of evidence." *Anderson*, 477 U.S. at 247-48, 106 S.Ct. 2505; *Hart v. O'Brien*, 127 F.3d 424, 435 (5th Cir.1997), cert. denied, 525 U.S. 1103, 119 S.Ct. 868, 142 L.Ed.2d 770 (1999). "Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." Brown, 337 F.3d at 540; *Bridgmon v. Array Systems Corporation*, 325 F.3d 572, 577 (5th Cir.2003); *Hugh Symons Group, plc v. Motorola, Inc.*, 292 F.3d 466, 468 (5th Cir.), *cert. denied*, 537 U.S. 950, 123 S.Ct. 386, 154 L.Ed.2d 295 (2002). Summary judgment is mandated if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to its case on which it bears the burden of proof at trial. *Nebraska v. Wyoming*, 507 U.S. 584, 590, 113 S.Ct. 1689, 123 L.Ed.2d 317 (1993); *Celotex Corporation*, 477 U.S. at 322, 106 S.Ct. 2548.

Appendix B

Privacy Act Standards

The Privacy Act, Title 5 U.S.C. § 552a, seeks "to protect the privacy of individuals identified in information systems maintained by Federal agencies," Pub.L. No. 93-579, § 2(a)(5), 88 Stat. 1896, 1896 (1974), because such privacy "is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies." *Id.* § 2(a)(1). Over the years, the courts have been zealous in protecting the privacy rights of its citizens under this Act as shown by: *Pippinger v. Rubin*, 129 F.3d 519, 529 (10th Cir.1997) (no evidence of wilfulness); *Quinn v. Stone*, 978 F.2d 126, 131 (3rd Cir.1992) ("stating that a record can . . . consist of a single piece of information"); *Bartel v. FAA*, 725 F.2d 1403 (D.C.Cir.1984) (the seminal case interpreting the Privacy Act's disclosure provision).

The Act provides four causes of action: (1) for an agency's failure to amend an individual's record pursuant to his request; (2) for an agency's denial of access to an individual's records; (3) for an agency's failure to maintain an individual's records with "accuracy, relevance, timeliness, and completeness;" and (4) for an agency's failure to comply with other Privacy Act provisions, which has an "adverse effect" on the individual. See *Gowan v. U.S. Dep't. of the Air Force*, 148 F.3d 1182, 1187 (10th Cir.1998) (listing the four causes of action).

Here, Pierce asserts the fourth cause of action. He claims the Air Force willfully disclosed a "record"

contained in a "system of records" in violation of § 552a(b) and that the disclosure had an adverse effect upon him.

The Act defines "record" in a relatively broad fashion: "any item, collection, or grouping of information about an individual that is maintained by an agency . . . that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." *Id.* § 552a(a)(4). That is, to be a "record," an item must contain "information that actually describes the person in some way." *Tobey v. NLRB*, 40 F.3d 469, 472 (D.C.Cir.1994).

Section 552a(b) provides that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person," unless the disclosure falls within one of twelve statutory exceptions. § 552a(b). These exceptions are enumerated as follows: (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties; (2) required under section 552 of this title; (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section; (4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13; (5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record

is to be transferred in a form that is not individually identifiable; (6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value; (7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought; (8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual; (9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee; (10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office; (11) pursuant to the order of a court of competent jurisdiction; or (12) to a consumer reporting agency in accordance with section 3711(e) of title 31.5 U.S.C.A. § 552a.

The Air Force has not alleged that any exception applies to this case. The Air Force contends instead that it never willfully disclosed a "record." This point is vital because the disclosure of a "record" is an essential element constituting a showing that the Privacy Act has been violated.

In order to prove a violation of the Privacy Act, a plaintiff must present evidence of the following elements: (1) the information is a "record" within a "system of records;" (2) the agency disclosed the information; (3) the disclosure had an adverse effect on him; and (4) the disclosure was intentional or willful. 5 U.S.C. § 552a(g); *Jacobs v. National Drug Intelligence Center*, 423 F.3d 512, 516 (5th Cir.2005). So, only the first element is at issue here, whether the information disclosed about Pierce is protected by the Act as a "record" within a "system of records."

Privacy Act Analysis

Pierce contends that the duty title designated in the final response letter make the document a "record" and is thus protected under the Privacy Act because the duty title was an "identifying particular" assigned to him. According to the Air Force, the Privacy Act does not apply because the final response document was not a record and was not contained within a system of records. The Air Force's interpretation of the statute is supported by both the statute's text and the cases interpreting it.

It is undisputed that the final response did not reveal Pierce's name, but instead, listed his duty title. This court is not persuaded that the duty title identified Pierce particularly, nor does the court believe the duty title is unique to an individual. During a hearing on this matter, the court heard testimony illustrating that different officers were associated with similar duty titles. In fact, plaintiff's duty title of C-26 Program Manager was not unique to him by the time the newspaper articles surfaced. Plaintiff had a predecessor in that position, as well as a successor. Although the newspapers managed to connect plaintiff to certain accusations, the newspapers could not have done so without resort to information outside of the Air Force final report. The newspapers have not said upon what other sources they relied.

The defendant relies on *Fleming v. United States R.R. Ret. Bd.* 2002 WL 252459 at *2 (N.D.Ill.2002), where that court held that a summary of an investigation that was disclosed in a semi-annual report to Congress did not constitute a "record," because the disclosure would have identified the plaintiff only to an individual who had other information that would have caused that individual to infer from the report that the plaintiff was the subject of the investigation.

This court agrees with the Air Force that without additional information, the newspapers could not have singled out Pierce for alleged wrongful conduct. Therefore, the court is not persuaded that the duty title listed by the defendant is the equivalent of a name or particular individual.

Appendix B

Conclusion

Having applied the appropriate juridical principles to the undisputed material facts of this lawsuit, viewed in a light most favorable to the non-movant, this court is persuaded to grant the Air Force's motion for summary judgment and to deny Robert Pierce's motion for partial summary judgment. The court will enter a Final Judgment in accordance with the local rules.

SO ORDERED AND ADJUDGED, this the 30th day of September, 2006.

s/ Henry T. Wingate
Chief United States District Judge

APPENDIX C — EXCERPTED REGULATIONS OF THE OFFICE OF MANAGEMENT AND BUDGET

[40 Fed. Reg. 28948] **OFFICE OF MANAGEMENT AND BUDGET**

[Circular No. A-108]

HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

Responsibilities for the Maintenance of Records About Individuals by Federal Agencies

1. *Purpose.* This Circular defines responsibilities for implementing the Privacy Act of 1974 (Public Law No. 93-579, 5 U.S.C. 552a) to assure that personal information about individuals collected by Federal agencies is limited to that which is legally authorized and necessary and is maintained in a manner which precludes unwarranted intrusions upon individual privacy.

* * *

[40 Fed. Reg. 28951] * * *

The term "record", as defined for purposes of the Act, means a tangible or documentary record (as opposed to a record contained in someone's memory) and has a broader meaning than the term commonly has when used in connection with record-keeping systems. (It may also

differ from the usual definition of a computer record.) An understanding of the term "record", as it is used in the Act, is essential in interpreting the meaning of many of the Act's requirements.

A. "record"

Means any item of information about an individual that includes an individual identifier;

Includes any grouping of such items of information (it should not be confused with the use of the term record in the conventional sense or as used in the automatic data processing (ADP) community);

Does not distinguish between data and information; both are within the scope of the definition; and

[40 Fed. Reg. 28952] Includes individual identifiers in any form including, but not limited to, finger prints, voice prints and photographs.

The phrase "identifying particular" suggests any element of data (name, number) or other descriptor (finger print, voice print, photographs) which can be used to identify an individual. Identifying particulars are not always unique (i.e., many individuals share the same name) but when they are not unique (e.g., name) they are individually assigned—as distinguished from generic characteristics.

Appendix C

The term "record" was defined "to assure the intent that a record can include as little as one descriptive item about an individual." (*Congressional Record*, p. S21818, December 17, 1974 and p. H12246, December 18, 1974). This definition "includes the record of present registration, or membership in an organization or activity, or admission to an institution." (Senate Report 93-1183, p. 79). (While this language was written with reference to the definition of the term "personnel information" in the Senate bill, it would appear to be equally applicable to the term "record" as used in the Act.)

* * * *

APPENDIX D — EXCERPTED REGULATIONS OF THE OFFICE OF MANAGEMENT AND BUDGET

[52 Fed. Reg. 12990] **OFFICE OF MANAGEMENT AND BUDGET**

Privacy Act of 1974; Guidance on the Privacy Act implications of "Call Detail" Programs to Manage Employees' Use of the Government's Telecommunications Systems

Agency: Office of Management and Budget.

Action: Publication in final form of guidance on the Privacy Act implications of "call detail" programs.

* * *

4. Definitions

For the purposes of these Guidelines:

• All the terms defined in the Privacy Act of 1974 apply.

• "Call Detail Report"—This is the initial report of long-distance calls made during a specified period. A call detail report may be provided by a telephone company, the General Services Administration, or it may originate from a PBX (Private Branch Exchange) on an agency's premises. No monitoring of conversations takes place during or after the collection of data for this report. The report may contain such technical information as the

originating number, destination number, destination city and State, date and time of day a call was made, the duration of the call, and actual or estimated cost of the call. At this stage, a call detail report contains no information directly identifying the individuals making or receiving calls.

• "Call Detail Information" or "Call Detail Records"—These are records generated from call detail reports through administrative, technical or investigative follow-up. In some cases call detail information or records will contain no individually identifiable information and therefore no Privacy Act considerations will apply. In other cases, the information and records will be linked with individuals and the Privacy Act must be taken into consideration.

* * *

6. Privacy Act Implications

* * *

The threshold question for call detail information, then, is whether a telephone number is a record within the meaning of the Privacy Act. The answer to this question depends upon how the telephone number is maintained.

Standing alone, a telephone number, is not a Privacy Act record. To achieve the status of a Privacy Act record, a telephone number must be maintained in a way that

links it to an individual's name or some other identifying particular such as a Social Security Account Number.

When an agency assigns a specific phone number to an employee and maintains that information in a way that the name and number are inseparably connected, there is sufficient identification linkage that a Privacy Act record is created. (It should be noted that the Privacy Act does not require that the record be unique to the individual, only that it be "about" him or her and include his or her name or other identifying particular. Thus, a telephone number could be shared by several individuals and still meet the Privacy Act "record" definition.)

The initial call detail reports which contain only technical information about telephone usage do not consist of records within the meaning of the Privacy Act and they will therefore never reach the level of a system of records. For many areas of telecommunications management, the information in call detail reports will never become systems of records and the Privacy Act will have no application.

When, however, call detail records are used in management programs designed to control costs and determine individual accountability for telephone calls, Privacy Act considerations must be addressed. In order to carry out these kinds of call detail programs, agencies will have to link numbers and names so that they can determine who is responsible for what call. It is at this point, that the telephone number meets the Privacy Act definition of a "record."

* * * *